No. 40062-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Aaron Hahn,

Appellant.

Clallam County Superior Court Cause No. 08-1-00195-3

The Honorable Judge George L. Wood

Appellant's Reply Brief

Corrected Copy

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I. THE AMENDED INFORMATION WAS LEGALLY AND FACTUALLY DEFICIENT.

A charging document must adequately notify the accused person of both the legal elements and the underlying facts giving rise to the charge. *State v. Leach,* 113 Wash.2d 679, 689, 782 P.2d 552 (1989). The Information must do "[m]ore than merely list[] the elements;" instead it

> must allege the particular facts supporting them… Failure to provide the facts "'necessary to a plain, concise and definite statement'" of the offense renders the information deficient.

State v. Nonog, 169 Wash.2d 220, 226, 237 P.3d 250 (2010) (citations omitted) (quoting *Leach, at* 690); *see also Auburn v. Brooke*, 119 Wash.2d 623, 836 P.2d 212 (1992). The Amended Information here is both legally and factually deficient.

To be legally sufficient, an Information charging solicitation of a crime must include the essential elements of the completed offense. *See, e.g., State v. Vangerpen*, 125 Wash.2d 782, 785, 888 P.2d 1177 (1995). Here, as in *Vangerpen,* the charging document did not set forth the essential elements of the completed offense (first-degree murder). Specifically, the Amended Information omitted the requirement that the actor cause the death of another person. CP 21; *see* RCW 9A.32.030(1)(a).

Accordingly, the Information is legally deficient, and does not charge a crime. *Vangerpen, supra.*

To be factually sufficient, an Information must set forth the specific conduct constituting the alleged crime. *Auburn v. Brooke, at* 629-630. The charging document in this case is factually deficient because it fails to provide any description of Mr. Hahn's specific conduct (other than to identify the alleged target of the plot by the initials "S.M."). Instead, the Amended Information uses the abstract language of the solicitation and murder statutes (although, as noted, it omits an essential element of first-degree murder). CP 21; *Brooke, at* 629-630.

Because the First Amended Information is both legally and factually deficient, Mr. Hahn's conviction must be reversed and the case dismissed; no showing of prejudice is required. *See State v. Brown,* 169 Wash.2d 195, 198, 234 P.3d 212 (2010) ("Under *Kjorsvik,* the court addresses whether the defendant was prejudiced only if the essential elements appear in the information, though unartfully, under some fair construction") (citing *State v. Kjorsvik*, 117 Wash.2d 93, 812 P.2d 86 (1991)).

The state fails to directly address Mr. Hahn's argument regarding the legal sufficiency of the charging document. Respondent correctly quotes the elements of first-degree murder, but does not acknowledge that

one element of the completed crime is missing from the charging document. Brief of Respondent, pp. 34-35. The prosecution was required to allege that Mr. Hahn acted with intent to promote or facilitate the completed crime of first-degree murder, an element of which is that the actor actually causes the death of another. RCW 9A.32.030(1).

The First Amended Information alleges only that Mr. Hahn intended to promote or facilitate a crime consisting of a single element: "with a premeditated intent to cause the death of another person...." CP 21. This nonsensical statement stems from the unthinking use of the phrase "to wit" and a concurrent failure to review the charging language for intelligibility. The Information should have set forth all the elements of criminal solicitation and all the elements of premeditated first-degree murder. It did not do so. CP 21. Even Respondent's argument that "this language appraised [sic] the defendant of the essential elements of the crime charged" did not spell out the elements of first-degree murder. *See* Brief of Respondent, p. 35 (omitting intent, causation, and death elements of the completed crime).

The state also fails to directly address the factual deficiency, although Respondent tacitly acknowledges that the charging document does not recite specific facts relating to this case. Brief of Respondent, pp. 36-37. According to Respondent, "these facts are not necessary allegations

for the offense of solicitation to commit murder." Brief of Respondent, p. 36. This ignores the Supreme Court's clear mandate that the Information include not only the essential legal elements of the charged crime, but also the specific conduct of the accused person. *Leach, at* 689; *Brooke, at* 629-630.

Because the Information is legally and factually deficient, Mr. Hahn need not show prejudice. *Brown, at* 198. Despite this, Respondent focuses on a perceived lack of prejudice: "It is important to note that… [Mr. Hahn] immediately understood from where the allegation derived;" "[f]urthermore, from the outset of the case, Mr. Hahn knew [the elements of first-degree murder];" "Mr. Hahn understood the elements of the crime charged and what conduct of his constituted the offense;" "Mr. Hahn neither argues, nor proves that the failure to include these specific facts within the amended information affected his ability to prepare an adequate defense…" Brief of Respondent, pp. 35-37.

Respondent's contention (that Mr. Hahn received actual notice and was not prejudiced) is irrelevant for two reasons. First, as noted above, Mr. Hahn need not show prejudice; prejudice becomes an issue only when

the element "appear[s] in the information, though unartfully, under some fair construction." *Brown, at* 198. Such is not the case here.[1]

Second, the Amended Information does not charge any crime at all. CP 21; *see Vangerpen, at* 795 ("[I]t is possible for a charging document to inadvertently omit one or more elements of the crime sought to be charged and succeed in charging no crime at all.") Conviction is therefore a legal impossibility, since a person may not be tried for an offense not charged. *Vangerpen, at* 788; *Brooke, at* 627; *see also State v. Irizarry,* 111 Wash.2d 591, 592, 763 P.2d 432 (1988).

Here, the Amended Information did not charge a crime. It is both legally and factually deficient. Accordingly, Mr. Hahn's conviction must be reversed and the case dismissed without prejudice. *Brown, supra.*

[1] Respondent's contention that Mr. Hahn "should have requested a bill of particulars" is likewise without merit, given the deficiencies in the charging document. Brief of Respondent, p. 37.

II. THE POLICE AND THEIR AGENTS[2] SHOULD NOT HAVE SOLICITED STATEMENTS FROM MR. HAHN BECAUSE HE WAS REPRESENTED BY COUNSEL IN A "CLOSELY RELATED" PROSECUTION.

In Washington, police may not interrogate an accused person who is represented by counsel if the subject matter of the interrogation is "closely related" to the pending charges. *See* Appellant's Opening Brief, pp. 14-20 (examining Wash. Const. Article I, Section 22 under *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986)). Respondent fails to address this argument, asserting, instead, that the state and federal protections are "coextensive." Brief of Respondent, pp. 38, 41.[3] Respondent's assertion is erroneous; the Supreme Court has explicitly reserved ruling on the scope of Wash. Const. Article I, Section 22 as it relates to this issue. *State v. Gregory,* 158 Wash.2d 759, 819, 147 P.3d

[2] In a footnote, Respondent mistakenly implies that Mr. Hahn's challenge relates only to statements obtained by Sergeant Madison and Detective Hall. Brief of Respondent, p. 38, n. 19. This is incorrect. Mr. Hahn assigned error to the admission of statements made "to the police and their agents." Appellant's Opening Brief, p. 1. He also referenced police and their agents in his statement of issues, in his argument headings, and in the body of his argument. Appellant's Opening Brief, pp. 2, 16, 24, 27. Finally, Mr. Hahn concluded by arguing that "[a]ny statements Mr. Hahn made to police or their agents after Norman Livengood began working for the police, and any evidence derived therefrom, should have been suppressed." Appellant's Opening Brief, p. 27. *See Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 119 12 L.Ed.2d 246 (1964).

[3] Inexplicably, Respondent also devotes several pages to issues not raised by Mr. Hahn. *See* Brief of Respondent, pp. 38-41, 44-46 (addressing the Fifth Amendment, Wash. Const. Article I, Section 9, CrR 3.1(c)(1), and trial counsel's arguments to the Superior Court). Mr. Hahn's appellate argument focused exclusively on Wash. Const. Article I, Section 22.

1201 (2006) (citing *Texas v. Cobb,* 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001)).

Here, the two prosecutions were "closely related" for purposes of Article I, Section 22, using the pre-*Cobb* test. Appellant's Opening Brief, pp. 20-24 (citing, *inter alia, United States v. Arnold*, 106 F.3d 37, 42 (3rd Cir. 1997)). The state does not address this argument; instead Respondent focuses on the lack of formal charges and on the standards for joinder pursuant to CrR 4.3.1. Brief of Respondent, pp. 41-44; 46-47. These arguments are misplaced.

First, if the state and federal right to counsel are coextensive, the *Blockburger* standard set forth in *Cobb* applies, yet Respondent has made no effort to argue *Blockburger*. Brief of Respondent, pp. 38-47; *see Cobb, at* 173 (citing *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

Second, Respondent cites no authority suggesting that the test for joinder of offenses under CrR 4.3.1 should apply. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Mr. Hahn did not knowingly, intelligently, and voluntarily waive his right to counsel under Article I, Section 22. *See* Brief of Respondent,

pp. 39-41, 43-44. There is no contention that Mr. Hahn waived his rights when speaking to Livengood after the latter was recruited for the "sting" operation and to "Miguel" (Detective Grall). Brief of Respondent, pp. 39-44.

In addition, police questioning commenced when the officers visited Mr. Hahn and told him that he would be charged with solicitation of murder. The police should have known that this gratuitous announcement—which they claimed was standard procedure—was "reasonably likely to elicit an incriminating response from the suspect;" accordingly, it qualified as interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980). The fact that Mr. Hahn summoned them to talk further is irrelevant. *State v. Sargent,* 111 Wash.2d 641, 762 P.2d 1127 (1988). In *Sargent,* the Supreme Court addressed the admissibility of a confession that followed two days after custodial interrogation conducted without benefit of *Miranda* warnings:

> [T]he fact that Sargent thought about his predicament for several days before calling Bloom [a probation officer] does not render the telephone call or the subsequent confession voluntary. The call and the confession were 'sparked' by Bloom's statements in the first interview... The passage of time and the opportunity for reflection do not render the confession voluntary if the reflection was prompted by an improper interrogation.

Sargent, at 654. Here, as in *Sargent,* Mr. Hahn's statements to police were tainted by the earlier encounter.

Finally, Mr. Hahn's purported waiver was also tainted by the earlier violations involving undercover police agents Livengood and "Miguel" (Detective Grall). Violations of this type "require[] suppression of all derivative evidence gleaned through exploitation of the Government's wrongdoing." *United States v. Kimball*, 884 F.2d 1274, 1279 (9th Cir. 1989) (addressing similar violations under the Sixth Amendment). Evidence is "derivative" if (1) it is discovered through exploitation of the primary illegality, and (2) the primary illegality is the "but for" cause of that discovery. *Id.* Both tests are met here: absent the earlier violations involving Livengood and "Miguel," the police would have lacked a sufficient basis to charge Mr. Hahn, to tell him of the charges, or to question him about them.

For all these reasons, Mr. Hahn's statements to Livengood (after Livengood became a police agent), to "Miguel," and to Madison and Hall should not have been admitted at trial. His conviction must be reversed and the case remanded with instructions to exclude the fruits of the illegal police behavior. Wash. Const. Article I, Section 22; *Arnold, supra.*

III. THE TRIAL JUDGE SHOULD HAVE INSTRUCTED THE JURY ON SOLICITATION OF ASSAULT.

Respondent apparently concedes that Solicitation of Assault is a lesser-included offense of Solicitation of Murder under the legal prong of

the *Workman* test. Brief of Respondent, p. 49; *State v. Workman,* 90 Wash.2d 443, 584 P.2d 382 (1978). Accordingly, the sole issue on review is whether or not Mr. Hahn was entitled to instructions on Solicitation of Assault under the factual prong of the test.

An accused person is entitled to instructions on a lesser-included offense if the evidence supports an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wash.2d 428, 434, 197 P.3d 673 (2008). The trial judge takes the evidence in a light most favorable to the accused person. *State v. Smith*, 154 Wash.App. 272, 278, 223 P.3d 1262 (2009) (citing *State v. Fernandez-Medina,* 141 Wash.2d 448, 461, 6 P.3d 1150 (2000)).

Here, when taken in a light most favorable to Mr. Hahn, the evidence supports an inference that he committed Solicitation of Assault but not Solicitation of Murder. He told the police that he only wanted to scare S.M. , and that his intent was to have her frightened and not killed. Exhibit 46, pp. 3-7. He repeatedly told Livengood that he wanted her "to disappear," but never used the words "kill" or "murder."[4] Exhibit 11, 40,

[4] The only exception is when he said "I'd rather spend the rest of my life in prison for murder than six years for [rape]." Exhibit 41, p. 18. This statement, when taken in a light most favorable to Mr. Hahn, can be understood to mean that although he only meant to have her assaulted or threatened, he would go so far as to have her murdered rather than be convicted of a sex offense. It does not necessarily mean that he planned to have her murdered and did not plan to have her assaulted.

41, 42. He told Hendricksen of his desire to hurt her. RP (10/26/09) 91-92, 97, 104, 106, 109. When he spoke with "Miguel," they referred to a "gift" for S.M. , but never equated the word "gift" with her death. Exhibit 52.

From all this evidence, jurors could reasonably infer that Mr. Hahn hoped to scare S.M. away by having her assaulted, and that he did not wish to actually have her killed. Respondent's arguments to the contrary rely on the evidence in favor of the state's theory, overlooking any of the evidence outlined above. *See, e.g.,* Brief of Respondent, p. 50. This approach contravenes the requirement that evidence be taken in a light most favorable to the proponent of the instruction. *Smith, supra.*

Respondent does not contend that any error was harmless. Brief of Respondent, pp. 48-52. Nor does Respondent dispute Mr. Hahn's argument that any error violated his Fourteenth Amendment right to due process and his state constitutional right to a jury trial. Brief of Respondent, pp. 48-52. Thus if the error is not preserved by defense counsel's proffered instructions (which did not include a proper "to convict" instruction), it may nonetheless be reviewed as a manifest error affecting Mr. Hahn's constitutional rights, pursuant to RAP 2.5(a)(3).

Because the evidence (when taken in a light most favorable to Mr. Hahn) supports instructions on the lesser-included offense of Solicitation of Assault, the trial court erred by refusing the instruction. *Nguyen, supra.*

This error violated Mr. Hahn's right (under the statute, the state constitution, and the federal due process clause) to have the jury instructed on applicable lesser offenses. *Id;* RCW 10.61.006; Wash. Const. Article I, Sections 21 and 22; U.S. Const. Amend. XIV. *See* Appellant's Opening Brief, pp. 28-36. Accordingly, Mr. Hahn's conviction must be reversed and the case remanded to the trial court for a new trial. *Nguyen, supra.*

IV. THE PROSECUTION VIOLATED MR. HAHN'S CONSTITUTIONAL RIGHT TO A JURY TRIAL BY INTRODUCING OPINION TESTIMONY AS TO HIS STATE OF MIND.

A. The prosecutor improperly introduced opinion testimony on three occasions.

Opinion testimony on an accused person's guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 927, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). This includes opinions on the accused person's state of mind. *State v. Montgomery*, 163 Wash.2d 577, 589-595, 183 P.3d 267 (2008); *see also State v. Farr-Lenzini*, 93 Wash.App. 453, 970 P.2d 313 (1999).

Here, the prosecution introduced three opinions on Mr. Hahn's mental state. RP (10/26/09) 21, 69, 106. The trial court erroneously overruled defense counsel's objection to one such opinion; the admission of the other two opinions (without objection) created a manifest error

affecting Mr. Hahn's right to a jury trial.[5] U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 21 and 22. *Montgomery, supra.*

Livengood's testimony that he had no doubt in his mind "what the Defendant wanted" was a clear opinion regarding Mr. Hahn's intent. RP (10/26/09) 69. Livengood's follow-up response (that Mr. Hahn "wanted her to disappear… he wanted her to be murdered") only confirms this. RP (10/26/09) 69. In this testimony, Livengood claimed knowledge of Mr. Hahn's mental state—of his specific desires as to what should happen to S.M. . Respondent's unsupported assertion to the contrary is erroneous. Brief of Respondent, p. 55. Livengood's testimony was not a factual assertion about the exact words Mr. Hahn allegedly used, about his tone of voice, or about his demeanor; instead, the testimony clearly conveyed Livengood's opinion about Mr. Hahn's mental state. RP (10/26/09) 21,106.

Likewise, Livengood's testimony that he "believe[d] that [Mr. Hahn] was serious" and Hendricksen's statement "that it really sounded like [Mr. Hahn] wanted her dead" convey each witness's belief about Mr. Hahn's mental state. RP (10/26/09) 21,106. Respondent asserts that these

[5] Thus the errors can be reviewed for the first time on appeal, pursuant to RAP 2.5(a)(3). *See* Appellant's Opening Brief, pp. 38-41.

statements about Mr. Hahn's intent "[do] not constitute impermissible opinion testimony." Brief of Respondent, pp. 55, 56. This is false. As with the statement to which defense counsel objected, these two opinions were not factual assertions about Mr. Hahn's exact words, his tone of voice, or his demeanor; instead, they were opinions about his state of mind. RP (10/26/09) 21,106.

B. Mr. Hahn was prejudiced by the improper introduction of opinion testimony.

Two different standards apply to the errors committed here. First, the erroneous introduction of improper opinion testimony over Mr. Hahn's objection is presumed prejudicial. *Montgomery, supra; State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Respondent is obligated to show harmless error under the stringent test for constitutional error. *Id., at* 615. To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it

necessarily leads to a finding of guilt. *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Second, the admission of improper opinion testimony to which no objection was raised requires reversal if "the error caused actual prejudice or practical and identifiable consequences." *Montgomery, at* 595.

Reversal is required under either standard. The three inadmissible opinions directly supported the state's theory (that Mr. Hahn actually intended to promote or facilitate a murder) and undermined the defense theory (that Mr. Hahn was blowing off steam and intended, at most, to solicit an assault). The introduction of this testimony was prejudicial, and produced practical and identifiable consequences which were not mitigated by the court's instructions. *Montgomery, supra; see* Appellant's Opening Brief, pp. 39-41. Furthermore, the untainted evidence was not "overwhelming," as Respondent contends: Mr. Hahn told the police that he did not intend to have S.M. killed, and he did not use the words "kill" or "murder" when speaking to Livengood,[6] Hendricksen, or "Miguel." Exhibit 11, 46, 52.

The testimony should not have been admitted, and the errors were not harmless. Accordingly, Mr. Hahn's conviction must be reversed and

[6] Except for his statement that he'd rather spend life in prison for murder than six years for a sex offense, as discussed in an earlier footnote.

the case remanded for a new trial, with instructions to exclude the improper opinion testimony. *Montgomery, supra.*

V. MR. HAHN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel should have objected to inadmissible opinion evidence.

Failure to challenge the admission of evidence may deprive an accused person of the effective assistance of counsel. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998). Reversal is required if (1) there is no legitimate strategic reason for the failure to object, (2) an objection to the evidence would likely have been sustained, and (3) the result of the trial would have been different had the evidence been excluded. *Id.*

Here, defense counsel should have objected to Livengood's opinion that he "believe[d] that [Mr. Hahn] was serious" and Hendricksen's belief "that it really sounded like [Mr. Hahn] wanted her dead." RP (10/26/09) 21,106. Defense counsel should have objected to these opinions on Mr. Hahn's mental state under ER 701 (prohibiting lay opinion testimony), and because they violated Mr. Hahn's constitutional right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 21 and 22. *Montgomery, supra.* There was no strategic reason to allow the evidence to be introduced, since it

supported the state's theory of the case and undermined Mr. Hahn's theory.[7] Finally, the evidence was prejudicial, given the centrality of Mr. Hahn's intent to the outcome of the case. There is a reasonable possibility that the outcome of trial would have differed, had counsel objected. *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

Accordingly, defense counsel's failure to object to the inadmissible opinion testimony deprived Mr. Hahn of the effective assistance of counsel. *Saunders, supra.* The conviction must be reversed and the case remanded for a new trial. *Id.*

B. Defense counsel should have objected to the prosecutor's improper closing argument.

Generally, defense counsel should object to improper closing arguments. *Hodge v. Hurley*, 426 F.3d 368, 385 (6th Cir. 2005). At a minimum, counsel should raise the issue outside the presence of the jury. *Id, at* 386. Here, defense counsel should have objected when the state told the jury that the police believed Livengood. RP (10/27/09) 99.

The comment was improper for two reasons. First, the officer did not testify that he believed Livengood; instead, the exchange referenced by the prosecutor was to the contrary—that Livengood was asked to wear

[7] In fact, defense counsel did object on one occasion when Livengood provided his opinion. RP (10/26/09) 69. This confirms that defense counsel was not pursuing a strategy that involved introduction of the improper opinion testimony.

a wire because the police "weren't willing to just simply accept his word..." RP (10/13/09) 125. Thus, the prosecutor mischaracterized the testimony.

Second, by claiming that the officers believed Livengood, the prosecutor improperly vouched for Livengood's testimony and encouraged the jury to believe Livengood's version of events. RP (10/27/09) 99. Respondent's suggestion that this was proper rebuttal (because defense counsel "savagely attacked" Livengood's credibility) is without merit. It is always improper to argue that the police believed an informant. Defense counsel does not have the "power to 'open the door' to prosecutorial misconduct." *State v. Jones,* 144 Wash.App. 284, 295, 183 P.3d 307 (2008).

Defense counsel should have objected to the improper remark. Given the centrality of Livengood's testimony, there is a reasonable possibility that the prosecutor's statement tipped the balance in favor of conviction. Accordingly, Mr. Hahn was denied the effective assistance of counsel. *Reichenbach.*

C. If the trial judge's refusal to instruct on Solicitation of Assault in the Fourth Degree is not preserved for review, then Mr. Hahn was denied the effective assistance of counsel.

A defense attorney must be familiar with the relevant instructions applicable to the accused person's case. *See, e.g., State v. Tilton*, 149

Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). Here, defense counsel sought instructions on a lesser included offense, but failed to include a "to convict" instruction in his proposed instructions. CP 48-65. If the trial court's failure to instruct the jury on the lesser-included offense is attributable to defense counsel or is not preserved for review, then Mr. Hahn was denied the effective assistance of counsel. *Reichenbach, supra.* The conviction must be reversed and the case remanded for a new trial. *Id.*

VI. THE CRIMINAL SOLICITATION STATUTE IS OVERBROAD BECAUSE IT PUNISHES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The First Amendment protects free speech. U.S. Const. Amend. I; U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[8] Because conviction for solicitation can be based on words alone, the statute implicates the First Amendment. *See State v. Jensen*, 164 Wash.2d 943, 952, 195 P.3d 512 (2008).

A statute is unconstitutionally overbroad if it criminalizes a "substantial" amount of constitutionally protected speech or conduct. *Lorang, at* 26; *Virginia v. Hicks*, 539 U.S. 113, 118-119, 156 L. Ed. 2d

[8] Washington's Constitution affords a similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. Article I, Section 5.

148, 123 S. Ct. 2191 (2003). Such a statute may be challenged by anyone accused of violating it. *Lorang*, *at* 26. This is so even if the accused person's conduct is not protected by the First Amendment.[9] *Id.*

Speech encouraging criminal activity is protected unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Speech that qualifies as criminal solicitation is thus protected unless it is directed at imminent lawless action and is likely to produce such action. *Id.*

Without a limiting construction, Washington's solicitation statute (RCW 9A.28.030) is unconstitutionally overbroad. The offense involves "asking someone to commit a crime in exchange for something of value,"[10] even if the request is not directed at imminent lawless action and even if the request is unlikely to produce such action. This violates the First Amendment. *Brandenburg, supra; Hicks, supra.* Respondent's argument that Mr. Hahn's statements and acts "cannot enjoy the First Amendment's protection" are wholly irrelevant; the overbreadth challenge

[9] In essence, an accused person may bring a challenge on behalf of all possible defendants, to overcome the danger that the statute may deter or chill constitutionally protected speech. *Hicks*, *at* 118-119.

[10] *Jensen, at* 952.

here is to the statute, using the "expansive remedy" provided by the U.S. Supreme Court. *Hicks, at* 119.

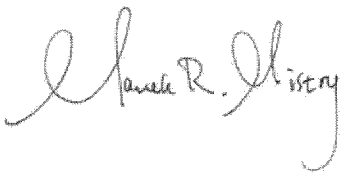
The statute is unconstitutionally overbroad. Because of this, Mr. Hahn's conviction must be reversed and the case dismissed with prejudice. *Brandenburg, supra.*

CONCLUSION

For the foregoing reasons, Mr. Hahn's conviction must be reversed and the case dismissed. If the case is not dismissed, it must be remanded to the trial court for a new trial.

Respectfully submitted on March 9, 2012.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief, Corrected Copy, to:

Aaron Hahn, DOC #332715
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

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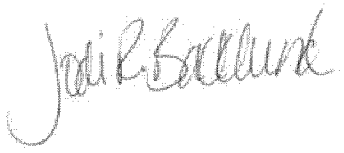
Signed at Olympia, Washington on March 9, 2012.



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